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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BIJAN PARTOVI, Plaintiff and Appellant, v. CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, Defendant and Appellant.	B164068 (Los Angeles County Super. Ct. No. BC243056)

APPEAL from a judgment of the Superior Court of Los Angeles County. Edward A. Ferns, Judge. Affirmed.

Law Offices of James P. Thompson, James P. Thompson; Esner & Chang, Stuart B. Esner and Andrew N. Chang for Plaintiff and Appellant.

Rockard J. Delgadillo, City Attorney, Richard M. Helgeson, Senior Assistant City Attorney, and Lisa S. Berger, Deputy City Attorney, for Defendant and Appellant.

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Bijan Partovi appeals from a judgment against him in his action against the City of Los Angeles, Department of Water and Power (City) for damages. The action arises from the flooding of the parking area of an office building owned by Partovi. The flooding was caused by a broken water main owned and maintained by the City. Partovi contends: "I. Whether the court granted nonsuit or directed verdict the standard of review is the same. [¶] II. The trial court erroneously granted nonsuit or directed verdict since questions of fact existed as to both of the alternative standards in Government Code section 835. [¶] III. Even if the court concludes nonsuit or directed verdict was properly granted under the claims act, it should still reverse so that Mr. Partovi can pursue an inverse condemnation claim." The City filed a protective cross-appeal. It contends that the trial court should have granted its motion based upon Partovi's failure to comply with the requirements of the Tort Claims Act (Gov. Code, § 810 et seq.).[1] We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

The original complaint was filed on January 9, 2001 (Complaint). The Complaint named "P.I.C. Corp." as plaintiff. It alleged that P.I.C. Corp. was the owner of an apartment building located at 1800 North Highland Avenue (the Property), which was damaged on October 7, 1999, due to the breaking of a water pipe owned, operated, and maintained by the City. A claim form listing "Hollywood Business Center (Bijan Partovi)" and the City's denial letter dated July 10, 2000, were attached to the complaint.

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[1] All statutory references are to the Government Code, unless otherwise indicated.

On January 19, 2001, Partovi filed his first amended complaint (FAC). It removed all reference to P.I.C. Corp., and named Partovi as the plaintiff. It alleged that Partovi was the owner of the Property.

The City answered the FAC. It denied the allegations of the complaint generally and alleged as an affirmative defense that the FAC was barred by the time limits of section 945.6. The answer also alleged that Partovi failed to file a lawsuit in his name within six months of when his claim was rejected, and that the FAC does not relate back to the filing of the Complaint.

In December 2001, the City filed a motion in limine seeking to exclude Partovi's testimony for failure to comply with the claim statute's requirements. Partovi opposed the motion in September 2002. The City filed a reply, and the trial court, after calling the case for trial, denied the motion.

Partovi presented his case. The parties stipulated that Partovi would dismiss his second count "relating to any secondary damage caused by the DWP employees pumping their vault out" on October 2, 2202. Later that day, Partovi rested his case.

The City moved for nonsuit. The trial court granted the nonsuit with regard to the issue of mandatory duty.[2] It reserved its ruling on the issue of dangerous condition of public property.

The City began presenting its evidence. After concluding its evidence on the issue of liability, the City moved for a directed verdict. The trial court then granted nonsuit on the dangerous condition of public property issue. At the City's request, the court stated that had it not granted nonsuit, it would have directed a verdict for the defense because Partovi had not met his burden of proof.

The trial court entered its judgment of nonsuit in October 2002. Partovi appealed from the judgment, and the City filed a cross-appeal.

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[2] Partovi does not challenge this ruling on appeal.

I. **Partovi's evidence**

Partovi put on evidence in his case-in-chief tending to show the following.

Partovi is the owner of the Property. The elevators at the Property were inspected in September 1999, and a permit for their operation was issued.

In October 1999, a water main broke, flooding two levels of parking at the Property. The water entered the Property through the parking entrance.

Partovi paid to have the Property cleaned up after the flood and for repairs to the elevators. In addition, some items stored at the Property were ruined by the flooding.[3] Partovi made an administrative claim for the damage in January 2000. The claim was denied on July 10, 2000.

In answer to interrogatories propounded to the City, it admitted that its broken pipe damaged the Property, but denied that the flooding caused all of the damage claimed. The City also stated that the pipe in issue was installed in 1937, that it had never been inspected because it was buried, and that the cause of the leak was unknown.

II. **The City's evidence**

The City put on evidence that tended to show the following.

A civil engineer for the City testified that the October 1999 water leak was caused by a six-inch water main breaking. The main was installed in 1937. It could not be inspected except by digging it up, and had not been inspected since its installation. The pipe was not old in relation to Los Angeles's water system, however. The system includes pipes dating from the 1890's.

The City monitors its water system by charting the pressure in the pipes. At the time of the break, the pressure in the pipe in issue was normal. The City also has

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[3] Both parties put on additional evidence regarding damage to the elevators. In light of the issues raised on this appeal, that evidence is not recounted.

maintained leak records since 1970. The pipe in issue had not leaked during that period, and had never leaked prior to this incident as far as the City is aware. It would be difficult to inspect the pipe with a camera because its interior is narrow and would have mineral deposits, which would mask any cracks or corrosion.

The water main is made of cast iron. Beginning in 1938, the City installed cast iron pipes with a thin cement lining. The lining increases water quality, and also reduces interior corrosion. The City currently has a program in place to add cement linings to previously unlined pipes that are in good shape. The City had scheduled the pipe in issue for relining before the break occurred. The pipe in issue has been subsequently lined with cement. It did not show signs of weakness at that time.

The cause of the October 1999 water leak is unknown. Pipes leak because of vibration, corrosion, unusual weight, earth slides, lack of support, acute pressure, or joint weakening. There was no joint leak. The water main leaked through a round crack in the pipe, which indicates that the leak was probably not caused by corrosion. Corrosion causes a hole, rather than a crack. The water line was maintained in a reasonable manner, and the leak could not have been prevented.

DISCUSSION

I. **Standard of review**

A motion for nonsuit may be made when the plaintiff has completed opening statement or the presentation of evidence. (Code Civ. Proc., § 581c, subd. (a).) When made after presentation of evidence, it concedes the truth of the facts proved by the plaintiff, but denies that they, as a matter of law, sustain the plaintiff's case. (7 Witkin, Cal. Procedure (4th ed. 1997) § 416, pp. 476-477.) A nonsuit may be granted when, interpreting the evidence most favorably to the plaintiff and resolving all presumptions, inferences and doubt in favor of the plaintiff, a judgment for the defendant is required as a matter of law. (*Curtis v. Santa Clara Valley Medical Center*

(2003) 110 Cal.App.4th 796, 800.) A judgment of nonsuit is reviewed de novo. (*Ibid.*)

A motion for a directed verdict may be made by any party after all the evidence is presented. (Code Civ. Proc., § 630, subd. (a).) The court considering the motion applies the same test as when ruling on a motion for nonsuit. (*Colbaugh v. Hartline* (1994) 29 Cal.App.4th 1516, 1521.) A directed verdict is reviewed de novo. (*Ibid.*)

II. **Liability for a dangerous condition of public property**

Liability against a public entity is statutory in nature. (*Thomas v. City of Richmond* (1995) 9 Cal.4th 1154, 1156.) Liability for a dangerous condition of public property is provided in section 835, which states: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either: [¶] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [¶] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

Partovi contends that the evidence was sufficient to support a judgment in his favor under subdivision (a) of section 835. He asserts that the City created a dangerous condition when it ignored foreseeable deterioration in the water main, which was installed more than 60 years before it leaked. We disagree.

Subdivision (a), section 835 requires that public employees' negligent or wrongful acts or omissions have actively created dangerous conditions under circumstances that would clearly justify a presumption of notice on the part of a public employer. (See *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836-837.)

Partovi, however, failed to put on evidence of the useful life of the water main. He produced no evidence of the appropriate standard of care in maintaining the water system. He did not show that City employees actively created dangerous conditions under circumstances that would justify a presumption of notice on the part of the City.

If the City's evidence is also considered, there is still no evidence from which the jury could conclude that the City created a dangerous condition.[4] The City showed that it maintained the water system by monitoring the pressure on the water main and maintaining records of leaks. It would be impractical to visually inspect the water main, which was buried. Using a camera was not a viable alternative because of the narrow diameter of the pipe and the likelihood that mineral deposits would mask any corrosion. The pressure in the main was normal at the time the water main broke, and it had never leaked before. Although he did not absolutely rule out the possibility of corrosion causing the leak, the City's expert testified that the leak was probably not caused by corrosion, but rather because of vibration or unusual weight. There was no showing that the maintenance program was deficient.

Fackrell v. City of San Diego (1945) 26 Cal.2d 196 (*Fackrell*), relied upon by Partovi, is distinguishable. *Fackrell* states the rule that liability is shown where a city has planned a street and sidewalk improvement, constructed the improvement according to the plan, and thereby created a dangerous or defective condition. In that case, the plaintiff showed that the city sprayed oil on a dirt walkway without providing for the effects of rain, even though it could expect that rains and erosion would wear away the soil under the oil coating. The plaintiff was injured when the walkway surface gave way and she fell into the underlying hole. (*Id.* at p. 207.) In contrast,

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[4] Where a nonsuit is erroneously denied, the appellate court considers all the evidence on appeal. (See *Housh v. Pacific States Life Ins. Co.* (1934) 2 Cal.App.2d 14, 18, overruled on another point in *Zuckerman v. Underwriters at Lloyd's* (1954) 42 Cal.2d 460, 474.)

here Partovi failed to show that the City's plan created an unreasonably dangerous condition.

In his opening brief, Partovi cites *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596 (*Pacific Bell*), *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 693, called into question on another point in *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 447-451, and *Lubin v. Iowa City* (1964) 257 Iowa 383, 391. The California authorities found public entities liable in inverse condemnation, and the Iowa case found liability based upon strict liability. Partovi argues that they support his claim that the City created a dangerous condition or had notice of a dangerous condition. Those cases are not evidence, however. They were not based on a theory of dangerous condition of public property, and were never presented below as either evidence or argument. The record does not support Partovi's position that the trial court erred in granting nonsuit under subdivision (a) of section 835.

Partovi contends that he presented sufficient evidence to support a judgment in his favor under a theory of constructive notice pursuant to section 835, subdivision (b). Again, we disagree. A public entity has constructive notice of a dangerous condition if the condition had existed for such a time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. (See § 835.2, subd. (b); and see *Strongman v. County of Kern* (1967) 255 Cal.App.2d 308, 313 [an indispensable element of constructive notice is a showing that the condition existed before the accident].)

The evidence does not support liability under section 835, subdivision (b). There was no evidence that the water main was in a dangerous condition. Partovi failed to show that such a condition either had existed for an extended period of time or was obvious in nature. The only evidence regarding the condition of the water main was that it had developed a crack. There was no statement regarding its condition prior to its cracking and no expert opinion regarding the useful life of the pipe. Partovi

failed to put on sufficient evidence to support a judgment based upon constructive knowledge.

Fackrell, *supra*, 26 Cal.2d 196, relied upon by Partovi, is distinguishable upon this issue as well. In *Fackrell*, our Supreme Court held that the city had constructive notice of the dangerous condition of a sidewalk because it knew there were potential defects in the sidewalk which would reasonably be expected to become actual and imminent unless vigilance in care and maintenance is exercised. (*Id.* at p. 207.) Partovi failed to show that the City had similar reason to expect that potential defects in the water main would become imminent. He showed only that the water line was installed in 1937, had not been inspected, and broke. There was no evidence that the expected useful life of the pipe was less than 60 years, and no evidence that the water main was defective. Partovi did not show that a reasonable inspection would have predicted the cracking of the pipe. Nonsuit was appropriate.

III. **Inverse condemnation**

Partovi concedes that he did not urge an inverse condemnation theory below, but argues that if we conclude that the trial court ruled correctly that there was no liability under the Tort Claims Act, then we should nevertheless reverse to allow Partovi to pursue a claim for inverse condemnation.

An appellate court will ordinarily not consider a point not properly raised in the trial court. A new theory may be raised on appeal where the facts are not disputed and the party raises a new question of law. (See *Ward v. Taggart* (1959) 51 Cal.2d 736, 741-742 (*Ward*); and see *Dudley v. Department of Transportation* (2001) 90 Cal.App.4th 255, 259-260 (*Dudley*).) Partovi contends that that reversal is appropriate where, as here, the appeal is from a summary dismissal. (*Dudley*, *supra*, 90 Cal.App.4th at pp. 259-260.) We note that unlike *Dudley*, which involved an appeal from judgment on the pleadings, the present case went to trial. The facts, moreover,

are disputed. Allowing the new theory to be raised would necessitate a new trial of additional issues. The City would therefore be prejudiced by a reversal.

Under inverse condemnation law, an actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable, whether foreseeable or not. (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263.) But a plaintiff in an inverse condemnation action must still make a showing of a substantial cause and effect relationship excluding the probability that other forces alone produced the injury. (*Souza v. Silver Development Co.* (1985) 164 Cal.App.3d 165, 171.) The City presented evidence that there are many reasons for a pipe failure, including earthquake, or unusual weight or vibration on the roadway above the line. There was no direct evidence of why the pipe leaked. Partovi did not exclude the possibility that the leak was caused by forces other than the system as deliberately designed. The factual basis for liability under inverse condemnation law is thus in contention. A retrial would be required for a determination of causation. Partovi may not raise the issue for the first time on appeal.

In any event, even assuming that Partovi is correct, and the evidence is sufficient to show that the physical injury to his real property was caused by the public improvement as deliberately designed and constructed (see *Barham v. Southern Cal. Edison Co.* (1999) 74 Cal.App.4th 744, 751), his position fails. Although we are sensitive to the policy that the costs of a public improvement benefiting the community should be spread among those benefited (see *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 602), a reversal on the present facts would not be proper.

In *Dudley*, *supra*, the court allowed an appellant to raise a new legal theory on appeal, where the underlying ruling was a judgment on the pleadings. A motion for judgment on the pleadings is the functional equivalent of a general demurrer. Here, by contrast, the motion for nonsuit was made after Partovi had presented his case in chief. The trial court took the matter under submission and allowed the City to put on its

evidence before ruling that the evidence was insufficient to support the theory raised -- dangerous condition of public property. In *Ward*, *supra*, an appellant was allowed to raise a new theory on appeal, where the new theory supported affirmance of the judgment and involved a question of law. Partovi would have this court reverse on the basis of a theory not raised below, requiring a new trial. We decline to do so.

IV. **Compliance with the Tort Claims Act**

Since we conclude that the trial court properly granted nonsuit, we need not reach the City's contention that Partovi failed to file his action within six months of the City's denial of his claim.

DISPOSITION

The judgment appealed from is affirmed. Bijan Partovi shall bear the costs of appeal of the City of Los Angeles.

NOT FOR PUBLICATION.

_____, Acting P.J.

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We concur:

_____, J.

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_____, J.

ASHMANN-GERST